STATE OF MICHIGAN

COURT OF APPEALS

CONNIE SAXON, Guardian of KEVIN SAXON, a minor,[1]

Plaintiff-Appellee,

v

CAROLE CHAPMAN,

Defendant,

and

ROSEANNA HAMILTON,

Defendant-Appellant,

and

TELEVISION STATION PARTNERS LP, d/b/a WEYI-TV, MICHAEL SHEARER, BRENDA CLAPPE, NED LOCKWOOD, FAY LATTURE, and CLIO AREA SCHOOL DISTRICT,

Defendants.

UNPUBLISHED
May 9, 2006

No. 266077
Genesee Circuit Court
LC No. 02-074970-NO

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Defendant Roseanna Hamilton[2] ("defendant") appeals as of right the trial court's order denying her motion for summary disposition. We reverse and remand for entry of judgment in favor of defendant.

[1] Kevin Saxon was a minor at the inception of this action. However, he reached adult status during the pendency of the lawsuit. Accordingly, Kevin Saxon will be referred to as "plaintiff" in this opinion.

In November 1999, plaintiff, a middle school student, took a coupon cutter with him to school. The cutter had a small metallic cutting strip. Plaintiff used the cutter to make red marks on his arms and hand, which he described as "cool." By the end of the day, a number of plaintiff's friends had either used the cutter to create marks on their own bodies, or had asked plaintiff to make marks for them. A teacher saw the marks and took plaintiff to the office. Plaintiff was eventually suspended from school. Local news media began running stories about the incident.

Plaintiff contends that during his suspension, defendant made several remarks about him to a classroom of students. According to plaintiff, defendant told the students that he was a dangerous student, that his father was an alcoholic and in prison, that his mother had died giving birth, and that he therefore had problems at home. Plaintiff asserts that defendant also told the students that he could have been infected with AIDS, that he could have passed the disease to the students who used the cutter, and that he would have been considered a murderer if any of the students had subsequently died. Defendant denies making these remarks. Rather, she contends that these comments were made by other students at the school.

Plaintiff brought this suit alleging (1) intentional infliction of emotional distress, and (2) invasion of privacy, based on a theory of intrusion upon seclusion.[3] Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The court denied her motion.

We review de novo a trial court's decision on a motion for summary disposition, viewing the evidence in a light most favorable to the opposing party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. The motion is properly granted where the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id*. A motion under MCR 2.116(C)(7) tests, inter alia, whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties. *Maskery v Bd of Regents of University of Michigan*, 468 Mich 609, 613; 664 NW2d 165 (2003).

Defendant first contends that she is immune from liability on plaintiff's claim for intentional infliction of emotional distress pursuant to MCL 691.1407(2). She thus asserts that summary disposition of this claim should have been granted under MCR 2.116(C)(7). We disagree. The immunity provided by MCL 691.1407(2) does not apply to the intentional torts of individual government employees. *Lavey v Mills*, 248 Mich App 244, 257; 639 NW2d 261 (2001); *Sudul v Hamtramck,* 221 Mich App 455, 458, 486-488; 562 NW2d 478 (1997).

(…continued)

[2] All claims against the remaining defendants were dismissed. Those remaining defendants are not parties to this appeal.

[3] Invasion of privacy is actually comprised of four separate torts: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts; (3) publicity that places the plaintiff in a false light; and (4) appropriation of the plaintiff's name or likeness. *Lewis v Dayton-Hudson Corp*, 128 Mich App 165, 168; 339 NW2d 857 (1983). Plaintiff's counsel made clear at the hearing on defendant's motion for summary disposition that plaintiff was asserting only the tort of intrusion upon seclusion or solitude.

Consequently, defendant was not entitled to summary disposition under MCR 2.116(C)(7) with respect to the intentional tort of intentional infliction of emotional distress.

Defendant also contends that she was entitled to summary disposition on plaintiff's claim of intentional infliction of emotional distress under MCR 2.116(C)(10). We agree. "As is often noted, our Supreme Court has not officially recognized the tort of intentional infliction of emotional distress." *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). However, assuming that the cause of action is valid, recovering for the tort requires a plaintiff to prove: (1) extreme and outrageous conduct, (2) intent, (3) causation, and (4) severe emotional distress. *Id*.; see also *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985).

Whether the offending conduct is extreme and outrageous is generally a question of law for the court. *VanVorous, supra* at 481. However, where reasonable minds could differ with respect to the nature of the allegedly offensive remarks, it is for the finder of fact to decide whether the conduct was extreme and outrageous. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995). As we have observed:

> The threshold for showing extreme and outrageous conduct is high. No cause of action will necessarily lie even where a defendant acts with tortious or even criminal intent. *Roberts, supra* at 602, citing Restatement [Torts, 2d], pp 72-73. Rather, liability is imposed only where "'the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Roberts, supra* at 603, quoting Restatement [Torts, 2d], pp 72-73. [*VanVorous, supra* at 481-482.]

Plaintiff claims that defendant made several offensive comments and disclosed a number of embarrassing facts about his family background. However, even viewing the evidence in a light most favorable to plaintiff, we cannot conclude that the allegedly offensive comments constituted "extreme and outrageous conduct." Defendant, a teacher at the middle school, was entitled to warn her students of the potentially dangerous effects of plaintiff's actions. In doing so, defendant allegedly commented regarding plaintiff's home life and family background. While we agree with plaintiff that the alleged comments were unfortunately neither sensitive nor discreet, the comments simply did not rise to the level of conduct that would "cause an average member of the community, upon learning of [the] conduct, to exclaim, 'Outrageous!'" *Doe, supra* at 93. Accordingly, even assuming that defendant in fact made the alleged offensive remarks, reasonable minds could not conclude that those remarks were sufficiently extreme and outrageous. Defendant was entitled to summary disposition under MCR 2.116(C)(10) on the claim of intentional infliction of emotional distress.

Defendant also contends that the trial court should have granted summary disposition in her favor with respect to plaintiff's claim of intrusion upon seclusion. We agree. "An action for intrusion upon seclusion focuses on the manner in which information is obtained, not its publication." *Id.* at 88. There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable person. *Id*.

Examining the third element first, plaintiff did not present any evidence regarding how defendant obtained the information that she allegedly released. Plaintiff suggests that defendant may have obtained the information from his school record. However, defendant testified that she did not view plaintiff's file and did not even know where the file was kept. Plaintiff does not claim to have personal knowledge that defendant accessed his permanent record or disciplinary file. Nor does plaintiff assert that anyone else has knowledge that defendant accessed his permanent record or disciplinary file. Instead, plaintiff merely speculates, without factual support, that defendant obtained the allegedly disclosed information in an offensive manner. This speculative suggestion is further cast in doubt by plaintiff's own admission that he did not know what was contained in his file. Logically then, if plaintiff himself was not even familiar with the contents of his file, he could not have known whether the record contained the particular information that defendant allegedly disclosed. In short, plaintiff has focused solely on the publication of the allegedly offensive information, and has put forward no substantive evidence that defendant acquired the information by way of an objectionable method.

As our Supreme Court observed in *Tobin v Civil Service Comm*, 416 Mich 661, 673; 331 NW2d 184 (1982), a claim of intrusion upon seclusion must fail when the plaintiff establishes "nothing objectionable about the method by which the information was obtained or is proposed to be released." Here, plaintiff puts forward nothing more than speculation to support his theory that the disclosed information was obtained through objectionable methods. It is well established that mere speculation and conjecture is insufficient to create a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Because plaintiff failed to establish the existence of a genuine factual dispute with respect to the third element of his intrusion upon seclusion claim, summary disposition should have been granted in favor of defendant. MCR 2.116(C)(10).

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Brian K. Zahra